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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT

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On Appeal from the Supreme Court of Mississippi

BRIEF FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT

INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, representing the interests of 635 member life insurance companies, including most of the major life insurers in the country. The Council's members currently hold ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The Health Insurance Association of America ("HIAA") represents the interests of 340 member companies which write over eighty-five percent of the health insurance written by insurance companies in the United States. The combined memberships of the HIAA

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[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

and the Council represent over ninety percent of the health insurance written by insurance companies in the United States.

Because the decision below creates the possibility that the nonpayment of an insurance claim may be accompanied by an unpredictable, though substantial, punitive award, the stability of the insurance industry is seriously threatened. Faced with large and unpredictable punitive awards—awards not anticipated in the contractual scheme of the insurer-insured relationship—members of the Council and the HIAA may be unable to provide affordable insurance policies. The Council and the HIAA thus have a direct and immediate interest in the issues presented in this case.

STATEMENT

Appellee Crenshaw was an insured beneficiary under a group accident insurance policy issued to his employer by Appellant Bankers Life and Casualty Company ("Bankers"). The policy—an "accident only" policy—provided coverage for losses "effected *solely* through an *accidental bodily injury* to the insured person." Jurisdictional Statement, 12a (emphasis added). As written, it covered, e.g., an *accidental* loss of limb.

On January 6, 1979, Crenshaw visited the emergency room of Kessler Air Force Base Hospital complaining of foot pains which he subsequently attributed to dropping of an automobile alternator on his foot. He was given medication and told to stay off his foot. He visited, and was released from, the emergency room of Kessler Air Force Base Hospital several additional times between January 9, and January 12, 1979. Although no clinical tests were run after the first of these visits, Crenshaw's injury was diagnosed as "ligamentous injury metatarsal right foot." Jurisdictional Statement, 4a. He received only minor treatment, including the application of a splint and the administration of pain medication.

On January 14, 1979, Crenshaw again returned to the hospital. This time, he was admitted as a patient. After his condition worsened and efforts to treat his foot failed, doctors amputated his leg six inches below the knee. The report of the attending surgeon and the pathologist concluded that Crenshaw had "severe arteriosclerosis of the arteries" in the right foot and lower leg. Jurisdictional Statement, 8a.

In June 1979, Crenshaw filed a claim with Bankers for the loss of his lower leg. As part of the claim investigation, Bankers requested a Board-certified vascular surgeon whom Bankers employed as a medical director to review the medical records which Crenshaw presented. He concluded—and advised Bankers—that "trauma had nothing to do with the limb loss" and that the loss resulted instead from Crenshaw's pre-existing arteriosclerosis. 483 So. 2d 254, 273 (Miss. 1985). Although Bankers' procedures normally would have involved additional investigation of the claim, the surgeon advised Bankers that the medical records provided by Crenshaw were sufficient to arrive at a medical judgment. Accordingly, on June 11, 1979, Bankers denied Crenshaw's claim, relying on the surgeon's opinion that the amputation was not caused by any "accidental" injury to Crenshaw's foot.

The Proceedings Below

Crenshaw instituted this suit in Jackson County Circuit Court on November 10, 1980. He initially requested $20,000 in compensatory damages and $400,000 in punitive damages for Bankers' alleged bad faith refusal to pay his insurance claim. On the eve of trial in December 1981, Crenshaw amended his complaint to seek $1,635,000 in punitive damages.

At trial, Crenshaw's treating physician testified that trauma contributed to the loss of his leg. Because Bankers presented evidence to the contrary—that arteriosclerosis was the sole cause of the loss—the trial court

declined Crenshaw's request for a peremptory instruction on Bankers' contractual liability. Despite the trial court's implicit conclusion that Bankers had at least an arguable basis for its coverage position, it nonetheless instructed the jury on punitive damages. The jury then found for Crenshaw, awarding him $20,000 in compensatory damages and $1.6 million in punitive damages. The jury reached its conclusion after hearing evidence that Bankers had net assets of $294 million in 1980.

On appeal, the Mississippi Supreme Court affirmed the trial court's judgment.[2] As to the punitive damages award, the court below acknowledged Mississippi precedents that an insurer's demonstration of an "arguable basis" for denying coverage generally precludes submission of a punitive damages claim to the jury. *See Reserve Life Insurance Co. v. McGee*, 444 So.2d 803 (Miss. 1983); *Blue Cross & Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss. 1985). The court nevertheless sustained the trial court's submission of Crenshaw's punitive damages claim to the jury. It found punitive damages to be appropriate where, as it found in this case, "the carrier offers *no justifiable reason or arguable basis* under Mississippi law for denying a valid claim." 483 So.2d at 271 (emphasis added). Accordingly, the court below upheld the punitive damages award.

Three justices dissented, stating that "the majority en route to affirmance has wholly departed from [Mississippi's] general substantive rules regarding the assessment of punitive damages." 483 So.2d at 296. They reasoned, *inter alia*, that under Mississippi law, Bankers' good

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[2] The Court added a fifteen percent penalty ($243,000) to Crenshaw's award pursuant to a Mississippi statute requiring such assessments against unsuccessful defendant-appellants. *See* Miss. Code Ann. § 11-3-23 (Supp. 1982).

faith reliance on its medical director's opinion precluded any award of punitive damages, and that the "arguable basis" standard applied by the majority was an inappropriate and unprecedented departure from the punitive damages standard traditionally applied in Mississippi.

As to the amount of the punitive damages award, five justices, focusing principally on the "pecuniary ability or financial worth of the defendant," 483 So.2d at 278, concluded that a punitive damages award should be altered as excessive only when it shocks "the judicial conscience, not the actual conscience of the members of this Court." *Id.* Finding that the "judicial conscience" could not be shocked by a punitive damages award which constituted "less than 1% of the financial net worth of the defendant," it affirmed the award. *Id.*

SUMMARY OF ARGUMENT

I. The award of punitive damages below—more than 80 times the actual damages in a case which did not involve invasion of any basic right or imposition of any severe or continuing injury—was imposed without any coherent substantive standards and without any particular procedural safeguards to ensure that the award was rational, fair, or based upon intelligible standards. This offends both due process and the Eighth Amendment prohibition against excessive fines. It is clear that the award was punishment—and very serious punishment indeed. It is also clear that any criminal defendant faced with a $100 misdemeanor, and any jury charged with imposing it, would have been provided clearer standards and more exacting guidance than that provided to Bankers and the jury below. "Bad faith" and the distinctions between negligence and gross negligence are concepts too blurry to support the huge and unpredictable range of

results available to juries. The result reflected in the verdict below demonstrates all too clearly the imprecision in asking juries to draw such distinctions. A higher standard of proof, and a clearer definition of the predicate conduct, are required, at the very least, to restore a semblance of due process.

II. The award of $1.6 million itself violates the Eighth Amendment as well because it is grossly disproportionate to the offense charged. Punitive damages are civil fines with penal purposes, and, as punishment, the basic Eighth Amendment principle of proportionality should apply to them. This principle, which has been applied since the Magna Carta, is, like other legal principles here, a bulwark against arbitrariness and jury passion. The " 'parallel limitations' on bail, fines, and other punishments," *Solem v. Helm*, 463 U.S. 277, 289 (1983), embodied in the Eighth Amendment should apply to an exaction that operates as a fine. That the jury exacted a fine without the support of either a criminal finding or the limits of a criminal statute should argue for, rather than against, relief.

Although the Eighth Amendment has yet to be applied in a punitive damages case, the time is now ripe. The proliferation of punitive awards, the meaningless standards, and the profligacy of the amounts assessed all demonstrate that there is no rational or reliable jurisprudence to be applied here if the Due Process Clause and the Eighth Amendment are not. Punitive damages become a windfall for the plaintiff, and a random, cruel surprise for defendants. Punitive damages should not continue to enjoy immunity from constitutional scrutiny.

ARGUMENT

I. THE ASSESSMENT OF PUNITIVE DAMAGES IN THIS CASE VIOLATES DUE PROCESS

A. Introduction

As this Court has aptly observed:

> For all its consequence, 'due process' has never been, and perhaps never can be, precisely defined. '[U]nlike some legal rules' . . . due process is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Rather, the phrase expresses the requirement of 'fundamental fairness.'

Lassiter v. Department of Social Services, 452 U.S. 18, 24, *reh'g denied*, 453 U.S. 927 (1981) (citations omitted). The burgeoning development of modern punitive damages law—exemplified by the decision below affirming a $1.6 million award for failure to pay a $20,000 insurance claim—urgently requires application of the standards and fairness doctrines embodied in the Due Process Clause.

Punitive damages are not "a favorite of the law." *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Current practices regarding punitive damages are neither time-honored, nor logically related to traditional legal doctrines. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-46 (1986). Rather, they are an historical anomaly, transported in neo-natal form from eighteenth century England and nurtured by early American courts to compensate—in small amounts—victims of insult torts, such as libel and slander, and similar intangible and otherwise unredressable injuries. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983); *Day v. Woodworth*, 13 Howard 363, 371 (1851).

From this small beginning, punitive damages have recently been extended far beyond their origin in insult torts and have been stretched beyond rational limits.[3] Despite a steady growth in the types of injuries, intangible or otherwise, for which courts now provide compensation, recent years have seen an uncontrolled and arbitrary expansion of punitive damages law and an explosive increase in the size and frequency of punitive awards.[4] Large sums have been awarded in other cases against insurance companies by juries who, left unguided, have assessed damages "in a way that can only be called freakish." *Gregg v. Georgia*, 428 U.S. 153, 206, *reh'g denied*, 429 U.S. 875 (1976). Moreover, lower courts have varied unpredictably in their willingness to

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[3] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, n.10.

[4] The best known example is the $1 billion punitive damages award recently upheld against Texaco. *See Texaco, Inc. v. Pennzoil*, —— S.W. 2d ——, 55 U.S.L.W. 2454 (Tex. App. 1987). But results in product liability and mass tort cases illustrate these trends as well. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981) ($125 million punitive award remitted to $3.5 million); *Ford Motor Company v. Stubblefield*, 319 S.E.2d 470 (Ga. App. 1984) ($8 million); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) ($5 million), *modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982) ($3 million); *Hasson v. Ford Motor Company*, 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982) ($4 million), *cert. dismissed*, 459 U.S. 1190 (1983). Many other comparable awards, and awards in smaller amounts, have proliferated. *See also* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986) (hereinafter "Justice Department Report") at 3 (measured in constant 1984 dollars, the *average* personal injury punitive damage award in Cook County, Illinois rose from $40,000 in 1970-74 to $1,152,174 in 1980-84).

disturb these often exorbitant awards.[5] Since the business of insurance is dependent upon the insurer's ability

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[5] Some awards have not survived judicial scrutiny. *See, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed*, 455 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974).

Many others, however, have been upheld. *See, e.g., Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073 (Ariz. 1987) (affirming a $3.5 million punitive award and a $15,000 compensatory award against insurer); *Downey Savings & Loan Co. v. Ohio Casualty Insurance Co.*, 189 Cal.App.3d 1072, 234 Cal. Rptr. 835 (1987), *pet. for review filed*, April 7, 1987 ($5 million in punitive damages awarded for bad faith denial of $152,983.42 claim); *Flanigan v. Prudential Federal Savings & Loan Ass'n*, 720 P.2d 257 (Mont.), *appeal dismissed*, 107 S.Ct. 564 (1986) (compensatory award of $194,000; punitive award of $1,300,000); *Lavoie v. Aetna Life & Casualty Co.*, 470 So.2d 1060 (Ala. 1984), *rev'd*, 106 S. Ct. 1580 (1986) (state court upheld $3.5 million punitive damages award for alleged bad faith failure to pay a $2,000 insurance claim); *T.D.S. Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520 (11th Cir. 1985) (jury award of $2.1 million in punitive damages against insurer held not to be excessive); *Dempsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million without explaining any basis for the $1.5 million figure it selected); *Frazier v. Metropolitan Life Insurance Co.*, 169 Cal.App.3d 90, 214 Cal. Rptr. 883 (1985) (jury award of $8 million in punitive damages, as remitted to $2 million, overturned upon finding that claim was time-barred); *Moore v. American United Life Insurance Co.*, 150 Cal.App.3d 610, 197 Cal. Rptr. 878 (1984) (court held $2.5 million punitive damages award not to be excessive, even though award was 83 times the amount of compensatory damages); *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million award of punitive damages for insurer's tortious termination of insurance benefits upheld).

to make careful, exact computations of risks, the expansion of punitive damages in the insurance industry produces particularly pernicious effects.

The uncontrolled expansion in availability of punitive damages, and the explosive growth in the size of the awards, have been widely recognized. Indeed, the Justice Department, a task force of the American College of Trial Lawyers, and the American Bar Association independently have recommended needed reforms in this troublesome area of the law. *See* Justice Department Report (*supra* note 4), at 2 (attributing insurance crisis in part to "the explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as . . . punitive damages"); Report of the Task Force on Litigation Issues of the American College of Trial Lawyers (August 8, 1986); Resolutions of the American Bar Association, approved February, 1987. Such broad-based expressions of concern reflect recognition that punitive damages, as currently awarded, are both unprecedented and so standardless and unfair as to violate due process.

Finally, the Due Process Clause is surely impacted by the fact that punitive damages are taken from the defendant and paid not to the government but to the plaintiff, above and beyond the plaintiff's actual damages. The defendant is mulcted by governmental action in order to give the plaintiff a windfall. This is a clear case of an exercise of governmental power "that takes *property* from A. and gives it to B"—which one of the earliest opinions to issue from this Court cited as a paradigm of action beyond legislative power. *Calder v. Bull*, 3 Dallas 386, 388 (1798) (per Chase, J.; emphasis in original).

B. Punitive Damages Are Penal and, As Such, Require Application of Procedural Safeguards Available in Criminal Trials

"[I]n keeping with . . . cherished tradition, punishment cannot be imposed 'without due process of law.'" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963). Because the purposes and impact of punitive damages are plainly penal, constitutional protections akin to those accorded to criminal defendants should be afforded to defendants in punitive damages actions.

Though nominally civil, punitive damages are functionally penal. *Cf. United States v. Ward*, 448 U.S. 242, 248-49, *reh'g denied*, 448 U.S. 916 (1980) (where penalty is "so punitive either in purpose or effect" as to negate its civil label, it will be treated as penal). Indeed, this Court has so recognized:

> Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrence.'

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48 (1979), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added). *See also Smith v. Wade*, 461 U.S. 30, 58 (Rehnquist, J., dissenting); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Punitive damages further few, if any, goals of the civil law. Rather, they promote the traditional goals of punishment, e.g., retribution and deterrence, which this Court has stated "are not legitimate nonpunitive government objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).[6]

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[6] This Court, and lower courts, have been guided by the list of considerations articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69, in determining whether a law is penal in nature. Assessed under these factors, which are "neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S. at 249, punitive damages can only be deemed penal. While punitive dam-

That the award of $1.6 million on Crenshaw's $20,000 insurance claim was "penal" in a constitutional sense, so as to require enhanced procedural safeguards, is plain. As the court below stated, such an award serves "in the nature *of punishment for wrongdoing*" and to "set an example as to *deter* others from similar behavior." 483 So.2d at 268 (emphasis added).[7] But despite its penal character, the punitive award rendered against Bankers was accompanied by none of the procedural safeguards mandated by due process. Bankers was penalized—and stigmatized—without the protection of a constitutionally-mandated, elevated standard of proof, i.e., "proof beyond

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ages impose no "affirmative disability or restraint," *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168, they typically are imposed upon a showing of "willfulness" or "maliciousness," they are often assessed in amounts greater than criminal actions involving similar conduct, and no alternative purposes—other than punishment and deterrence—can rationally be assigned to them. *See* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986), Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985), and Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 Va. L. Rev. 269 (1983), for careful analyses of the penal nature of punitive damages.

[7] An additional purpose for punitive damages advanced by the court below—to "reward a plaintiff for public service in bringing the wrongdoer to account," 483 So.2d at 268-69—does not vitiate the penal nature of the punitive damages awarded here. First, the primary "public service" provided is deterrence—a penal goal under *Bell v. Wolfish* and *Kennedy v. Mendoza-Martinez*. The only other conceivable public service achieved is stigmatizing the defendant—the distinguishing characteristic of criminal sanctions. Equally important, a civil penalty is punitive, despite the presence of a non-punitive purpose, if the penalty "appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish*, 441 U.S. at 537-38, *quoting Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69. Crenshaw received the full value of his contract when he recovered compensatory damages. The only detriment he sustained, in contrast, was the amount of his attorneys' fees. The Mississippi courts could have allowed Crenshaw compensatory damages for those fees, instead of permitting the jury to assess, without regard to the amount of the fees, the excessive punitive award of $1.6 million.

a reasonable doubt"; was accorded none of the benefits of more stringent pleading requirements in criminal cases;[8] and the sanction was not determined in a less prejudicial bifurcated trial, but in the same proceeding during which its liability was decided. *See Rowan v. U.S. Post Office Department*, 397 U.S. 728, 740 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In Re Winship*, 397 U.S. 358 (1970); *Cole v. Arkansas*, 333 U.S. 196 (1948); *cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (enhanced burden of proof is constitutionally required where proceedings threaten one of the parties with a significant stigma). Moreover, unlike criminal defendants who face maximum punishments, Bankers' "punishment" was left to the unbridled—and unlimited—discretion of a jury. Without any of these safeguards of penal liability—e.g., an elevated standard of proof, standards for and limitations on the amount of punitive damages, pre-trial notice of the precise "charges," and bifurcation of punitive damages trials—the carelessness of recent history in punitive damage cases cannot be a substitute for constitutionally required due process.

C. There Are No Adequate Standards for Determining Liability for Punitive Damages

That punitive damages actions, as they now exist, fail to comport with even the simplest notion of due process is further evident from the complete lack of intelligible standards for assessing punitive damages—a deficiency starkly illustrated by the decision below. Indeed, although the court below cited one standard—that punitive damages are recoverable only for "a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong," 483 So.2d at

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[8] Even in civil fraud cases—causes accompanied by stigmatization of the kind the Mississippi courts imposed upon Bankers—the allegations generally must be pleaded with particularity. No doubt this requirement is rooted in an intuitive recognition of what is, and what is not, fair.

269—it also referred to a different test, i.e., whether Bankers failed to offer "a justifiable reason or arguable basis under Mississippi law for denying a valid claim," *id.*, at 271. Both "standards" are constitutionally deficient.

Under the Fifth and Fourteenth Amendments, it is clearly a denial of due process to punish a person who is without culpability. *See Smith v. Wade*, 461 U.S. at 87-88 (Rehnquist J., dissenting) ("It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm . . ."). But punitive damages—often awarded with no showing of intentional culpability—do precisely that. Indeed, the "standards" for imposing these damages, though never carefully defined, have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence. *See* Myers and Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 52 Ins. Counsel J. 212 (April 1984); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982).[9] Moreover, given the blurred distinctions between these vague and varying standards, such as "gross negligence" and "reckless negligence," no

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[9] As aptly stated by one author:

> Many of the insurance bad faith awards have been greatly excessive and . . . courts and juries have applied significantly different standards when awarding punitive damages in insurance cases than they have in other cases. The rational basis for such widely differing standards is not obvious. From an ethical standpoint, there is little basis to conclude that the type of misconduct typically found in insurance cases regularly deserves vastly greater sanctions than the blatant fraud and misrepresentations often found in other cases.

Sebert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. Rev. 1565, 1620 (1986).

real guidance is provided to judges and juries vested with authority to award punitive damages.[10] As a result, judges and juries remain free to "assess punitive damages in wholly unpredictable amounts bearing no relation to the actual harm caused . . . [and] to use their discretion selectively to punish expressions of unpopular views. . . ." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

These difficulties are all too evident in the present case. Requiring little more than a finding of liability on Crenshaw's contract claim, the court below upheld the jury's punitive award after saying that Bankers had shown no "arguable basis under Mississippi law" for denying Crenshaw's claim—a standard recognized by the dissent as a liberalized exception to punitive damages law carved out especially to support bad faith claims against insurance companies. Thus, the court, as well as the jury, plainly confused the state of mind necessary, at the least, to support the punitive award. Moreover, although the court below found that only five Bankers employees, out of a "nationwide accident and health insurance company," were involved in the denial of Crenshaw's claim, and although the court further emphasized that Bankers had proper investigatory procedures in place, it affirmed a massive penalty against Bankers as a whole on the basis of an arguable error that had occurred in day-to-

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[10] The difficulty of distinguishing conduct which is "reckless" as opposed to merely negligent, leads inevitably to inconsistent applications of these standards. As stated by one author:

> Unfortunately, the distinction between recklessness and negligence relates to no clear behavioral standards in the real world . . . . It is truly striking how we have devised a system that is not far from a lottery for deciding such grave matters—with the draw determined not only by the predilections of the presiding judge, but the emotions of the jury sitting in the case.

Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978).

day claims administration. 483 So.2d at 260, 270, 272, 276. It is not clear what Bankers could have done, or should do in the future, to avoid such punishment—except to pay all claims made, promptly and without question. The burden, of course, falls on shareholders, and eventually on policy owners. There is nothing rational or fair about awarding punitive damages in such circumstances.

D. Leaving the Computation of Punitive Damages to the Discretion of the Jury Fails to Satisfy Due Process

The "standards" used for determining the *amount* of punitive damages to be assessed against a defendant are equally deficient. In contrast to criminal sanctions, punitive damages are generally computed without regard to any statutory or common law maximum. Nor is any rational, intelligible, or workable measure of damages provided. The amounts of punitive damages are left to the sole discretion of the jury, guided only by ill-defined factors, including the wealth of the defendant, and "the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 419 U.S. 323, 350 (1974). *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979); *Smith v. Wade*, 461 U.S. 30, 56-65, 92-94 (dissenting opinions of Rehnquist and O'Connor, JJ.).[11]

The present case provides a clear example of unbridled jury discretion. Bankers was penalized by a jury which was guided by no more definite standards than

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[11] The standards upon which courts rely in reviewing jury awards of punitive damages are equally imprecise, requiring judges to inquire generally whether an award reflects the passions or prejudices of the jury. The difficulty of this review, and the lack of guidance to judges, are all too evident from the decisions below, where the trial court concluded that it had no "authority to change the punitive damages" awarded against Bankers. Jurisdictional Statement, 134a.

that its award should serve as punishment and a deterrent and should take into account Bankers' wealth. Swayed by evidence that Bankers' assets came to a total of $294 million, the jury awarded—and the court below affirmed—a $1.6 million punitive award which was apparently plucked out of the air, has not been explained, and bears little, if any, relationship to customary criminal sanctions or to meaningful punishment. These infirmities were enhanced by the automatic and arbitrary imposition, pursuant to Miss. Code Ann. § 11-3-23 (Supp. 1982), of a fifteen percent penalty against Bankers, as an unsuccessful defendant-appellant, in violation of *Lindsey v. Normet*, 405 U.S. 56, 74-80 (1971).

The constitutional infirmities inherent in punitive damages actions should no longer be ignored. In the absence of appropriate limits, clear and rational standards, and proper procedural protections, punitive damages should be eliminated entirely from the field of insurance—an area where they do not belong. (For the need for protection from "unbridled discretion" in another area, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Donovan v. Dewey*, 452 U.S. 594, 599, 600 (1981).) The ultimate responsibility rests with this Court to guard against stealthy encroachments upon constitutional rights by practices which spring from unjustified deviations from proper standards of due process. No clearer example of a stealthy encroachment exists than that which has developed in the field of punitive damages.

II. THE DECISION OF THE SUPREME COURT OF MISSISSIPPI UPHOLDING MASSIVE PUNITIVE DAMAGES SHOULD NOT STAND UNDER THE EIGHTH AMENDMENT

The Eighth Amendment provides protection against arbitrariness and excessiveness in punishment. Focusing upon the result itself, the Eighth Amendment ensures that punishment will not be meted out arbitrarily, or in

excessive amounts wholly disproportionate to the offense. Even assuming that the procedures employed in assessing punitive damage awards comport with due process, the decision below should not survive scrutiny under the Eighth Amendment.

The Eighth Amendment's ban against excessive punishments and its requirement of proportionality are derived from English law. By the thirteenth century, discretionary amercements, often excessive and oppressive, were prevalent in England—so prevalent that three chapters of Magna Carta were devoted to their control.[12] Indeed, Chapter 14 of Magna Carta, setting forth the rule against excessive punishment, provided:

> A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence, and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

J. Holt, *Magna Carta* 323 (1965).[13]

The principle that amercements could not be excessive was reiterated in the English Bill of Rights of 1689, which strove to curb selective and arbitrary application of harsh penalties by incorporating "the longstand-

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[12] The amercement was the equivalent of the modern fine. *See* Granucci, *"Nor Cruel and Unusual Punishment Inflicted": The Original Meaning*, 57 Cal. L.R. 839, 845 (1969). Though the discretionary character of amercements permitted the circumstances of each case to be considered, and the fine fixed accordingly, it invited the opportunity for arbitrary and excessive penalties. *Id.*

[13] Maitland said of this chapter that "very likely there was no clause in the Magna Carta more grateful to the mass of the people." F. Maitland, *Pleas of the Crown for the County of Gloucester XXXIV* (1884), *cited in* Granucci, *supra*, at 845.

ing principle of English law that the punishment . . . should not be . . . greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959). Evidencing the intent of the English Bill of Rights to preclude disproportionate and excessive fines, the House of Lords, "barely three months after the Bill of Rights was adopted, . . . declared that a 'fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna carta, the common right of the subject, and the law of the land." *Solem v. Helm*, 463 U.S. 277, 285 (1983), *quoting Earl of Devon's Case*, 11 State Tr. 133, 136 (1689).

The concept of proportionality which was firmly embedded in English law by 1689 was transplanted to American soil, and ultimately incorporated into the Bill of Rights as the Eighth Amendment. *See Solem v. Helm*, *supra*, 463 U.S. at 285-86. This "constitutional principle of proportionality," *id.* at 286, was recognized by this Court as early as 1910. In *Weems v. United States*, 217 U.S. 349, 367 (1910), the Court held that the Eighth Amendment precluded the punishment of 15 years of imprisonment plus hard labor in chains for the crime of falsifying a public document, noting "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." On repeated occasions since *Weems*, the Court has resorted to the constitutional principle of proportionality to conclude that certain punishments are, or are not, excessive.[14] Most recently, this

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[14] *See Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence held to be disproportionate and excessive for the crime of rape); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation for wartime desertion violated the Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty for felony murder held to be excessive under the circumstances).

Court in *Solem* revisited the concept of proportionality in punishments, holding that the Eighth Amendment prohibits a life sentence, without possibility of parole, for the commission of a seventh nonviolent felony.[15]

Although this Court has had little occasion to address the Excessive Fines Clause of the Eighth Amendment, the cases decided under the Cruel and Unusual Punishments Clause provide a useful framework for assessing the validity of punitive damages under the Eighth Amendment—an issue of first impression in this Court. *See Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986), where this Court said that the argument that the imposition of massive punitive damages "is impermissible under the Excessive Fines Clause of the Eighth Amendment . . . raise[s] important issues which, in an appropriate setting, must be resolved." In light of the common origin of the clauses of the Eighth Amendment, the concept of proportionality should be equally applicable to all of the clauses of the Amendment. Indeed, as this Court has stated:

> We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, [430 U.S.] at 664,

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[15] In so holding, the Court weighed the gravity of the offense and the harshness of the penalty, and looked to the sentences imposed for similar conduct in the same and other jurisdictions, stating that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* at 291. Applying the considerations enunciated in *Solem* here, a punitive award, 80 times the amount of actual damages, is obviously excessive and grossly disproportionate to the offense of bad faith failure to pay an insurance claim. Moreover, consideration of the fines allowed for violation of the Mississippi Insurance Code, which proscribes unfair or deceptive acts or practices in insurance, removes all doubt that the award here was excessive. Section 83-5-49 of the Mississippi Code provides that a *willful* violation of a cease and desist order proscribing an unfair practice is punishable, at most, by a $1,000 fine. Miss. Code Ann. § 83-5-49.

> and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception.

Solem v. Helm, 463 U.S. at 289.[16]

The governing principle of proportionality as a protection against arbitrariness and excessiveness in punishment should lead to reversal of the award of penalty damages in the amount of $1.6 million against Bankers for the "offense" of declining to pay a $20,000 insurance claim. The award of $1.6 million against Bankers was rendered in a proceeding which failed to comport with due process, and which permitted the jury to award a penalty in the form of punitive damages in an amount which was arbitrary and wholly disproportionate to the offense charged.[17] The complete absence of standards for

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[16] That punitive damages are nominally civil should not bar the application of the Eighth Amendment to them. Not only are punitive damages functionally penal (as their name clearly indicates), but the Eighth Amendment, unlike some other Bill of Rights guarantees, does not distinguish between civil and criminal punishment. *Compare* the Eighth Amendment ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted") *with* the Fifth Amendment (no person can be held to answer "for a capital, or otherwise infamous *crime*" without indictment by a grand jury; no person "shall be compelled *in any criminal case* to be a witness against himself") (emphasis added) and the Sixth Amendment ("[i]n all *criminal* prosecutions") (emphasis added). *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147-51 (1986).

[17] Significantly, this Court, in reviewing the role of the jury in meting out criminal sentences, has emphasized the importance of providing guidance to juries to protect against arbitrary and dis-

assessing punitive damages (an infirmity which would not survive in other criminal contexts) has led inevitably to a proliferation of similar punitive awards—a result which the Eighth Amendment proscribes.

Despite the magnitude of the punitive damages award assessed against Bankers, the court below concluded that it was not excessive, stating that "the judicial conscience could [not] be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant." 483 So.2d at 279. But to call the verdict below anything but excessive rejects the concept of proportionality and gives open-ended indulgence to the sort of jury passion—and, indeed, enthusiasm—that inflates such awards. By upholding an award of $1.6 million in punitive damages—for failure to pay a $20,000 claim after careful consideration—the court below has sanctioned a scheme of punishment which bears no ascertainable or rational relation to the offense charged. Such punishment should not be upheld under the plain words and purposes of the Eighth Amendment.

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criminatory sentences. *See Gregg v. Georgia*, 428 U.S. at 189 ("discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). Although guidance has traditionally been provided to juries assessing punishment in criminal contexts, no similar guidance—or, at least, no useful guidance—has been given by courts to juries vested with the power to assess punitive damages.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Appellant, the decision below should be reversed.

Respectfully submitted,

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